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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 810

DEWITT EDDIE ROGERS,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Respondent asserts that the petitioner's (hereinafter, "the defendant") "Statement of the Case" is incomplete and misleading, especially with respect to the defendant's total failure to reveal to this Court the important fact that there were *two* trials of this case, and that the defendant's motion to suppress was not presented until after the second trial had commenced. Therefore, respondent presents the following complete chronology of events: The defendant was charged with one count of armed robbery emanating from an incident which occurred at a Whitehall, Ohio, supermarket at about 9:00 p.m. on the evening of May 26, 1965. At trial, a cashier testified to being confronted at her checkout counter by a man, negro, armed with a pistol; who compelled her to turn over money to him and then

fled. The assailant was also observed by the cashier's supervisor as he left the store. Both women positively identified the defendant as the robber minutes after the above event.

A third witness, in his automobile in the parking lot outside the market, observed a negro man, dressed in an army fatigue jacket (also described by the two women store employees), running from the store. This witness saw the man turn into a parking area in front of another store in the shopping center.

The stock boys of the victimized supermarket started out the supermarket door shortly after the robbery and encountered the witness in the parking lot. They entered his automobile and immediately drove to the area where the defendant had last been observed. They spotted the defendant whose head was bobbing up and down in his automobile.

The police arrived about that time and the defendant was surrounded and apprehended. A search of the automobile was performed and the police discovered a crumpled $5.00 bill underneath the front seat. The automobile was then towed about a mile to the police station where a more thorough search was again conducted by the police. The balance of the money stolen and a gun were discovered concealed underneath the front seat. These items were admitted into evidence and are submitted by the defendant to be a subject of this appeal.

There ensued a preliminary hearing (June 2, 1965) at which time defendant made motions to the presiding Municipal Court Judge to suppress the evidence in question. The municipal court considered the motion to be premature, and further informed the defendant that notwithstanding the court's opinion that the search was constitutionally proper, questions of suppression of evidence were a problem for a judge of the Court of Common Pleas.

The defendant was arraigned on July 23, 1965, in the Franklin County Common Pleas Court. A trial was held on December 16 and 17, 1965, but the jury was unable to return a verdict. In this trial, the State adduced the evidence now in question. The defendant did not move to suppress. In the second trial of this cause which commenced February 16, 1966, and subsequent to the impaneling and swearing of the jury, defense counsel advised the court that he was going to file a motion to suppress certain evidence. Subsequently, a written motion was handed to the court but was not filed. The trial court stated that the failure of defense counsel to prepare and file in a court of record a timely *pre-trial* motion to suppress the evidence constituted a waiver of defendant's rights to object to the introduction of such evidence. *State v. Davis*, 1 Ohio St. 2d 28, 203 N.E. 2d 357 (1964). Defense counsel then read into the record the fact of the motion having been made at preliminary hearing, to which the Court commented:

> The Court: "Mr. Wolery, this court is interested in the procedure of this court, not what took place in the Municipal Court. We have no way of knowing what took place in the Municipal Court and we have nothing in the files, nothing has been filed in this court."

The defendant was ultimately convicted and the judgment of the trial court was affirmed by the Franklin County Court of Appeals. The Supreme Court of Ohio declined to review this cause.

QUESTIONS OF LAW PRESENTED

The question of whether any evidence adduced at trial was the product of an unlawful search and seizure has never been properly raised or decided on the merits in any court of record in this cause and this Court does not sit as a court of first impression on such matters. Therefore

respondent does not discuss this issue in this Brief In Opposition. This brief will address itself, therefore, to the following questions of law raised by the defendant: (1) Is a motion to suppress evidence made at preliminary hearing in a Municipal Court and not made again until a second trial, and then only after a jury has been impaneled, "timely" within the clear meaning of *State v. Davis*, 1 Ohio St. 2d 28 (1964); (2) when such motion, as made, is held to be unseasonable and waiver is found to have taken place under the authority of *State v. Davis, supra,* does *Henry v. Mississippi,* 379 U.S. 443 (1965), which states that a non-federal procedural ground to be held sufficient to bar review of a constitutional claim must serve a valid state's interest, require a result in this cause contrary to that reached by state courts below.

LAW AND ARGUMENT

I.

A MOTION TO SUPRESS EVIDENCE MADE AT PRELIMINARY HEARING IN A MUNICIPAL COURT AND NOT MADE AGAIN UNTIL A SECOND TRIAL, AN THEN ONLY AFTER A JURY HAS BEEN IMPANELED IS NOT "TIMELY" WITHIN THE CLEAR MEANING OF STATE V. DAVIS, 1 OHIO ST. 2d 28 (1964) AND, UNDER THE FACTS PRESENTED THE DEFENDANT FILING SUCH BELATED MOTION HAS PROPERLY BEEN FOUND TO HAVE WAIVED HIS RIGHT TO FILE SUCH MOTION.

For the first time in this entire proceeding, the defendant devotes considerable attention to his concern that the state procedural rule clearly announced in *Sate v. Davis*, 1 Ohio St. 2d 28 (1964), was not well-established prior to *Davis* and that Ohio procedural requirements require a complete

legislative overhaul. The defendant further contends, *inter alia*, that the trial court in this case should have asked counsel for preliminary motions to any supposed evidence before impaneling the jury, and the defendant refers to the trial court's recently established pre-trial hearing procedure in criminal cases as support for this contention.

It is respectfully submitted that the defendant's desire for legislative action is ill-directed to this Court. It is further submitted that the defendant's suggestion that a trial court is obligated to remind experienced defense counsel that he is to file motions is a novel proposition without authority in either case law or current practice. Even Franklin County's current informal pre-trial hearing procedure in criminal cases is not designed for the presentation of motions, and, in any event, such procedure is irrelevant to the cause before this Court.

The questions before this Court in this branch of argument are whether a State procedural rule had been clearly announced before this defendant came to trial, and if such a rule had been announced, whether the defendant had ample and reasonable opportunity to avail himself of the benefits of such rule, and if the defendant had such opportunity but had failed to avail himself of the benefits of the rule, whether the rule's benefits have been waived. The second branch of argument will concern itself with the question of whether the waiver should be enforced.

Even the defendant concedes that the *Davis* case clearly announced a State procedural rule. In the first syllabus of this case—in Ohio, the court-prepared syllabi, and not the text of the opinion, state the law of the case—it is written:

> 1. "Where there has been an illegal search and seizure of evidence tending to incriminate an accused and such accused and his counsel know about such

> search and seizure in ample time to prepare and file a pretrial motion to suppress such evidence, a falure to do so will amount to a waiver by the accused of his right to object to admission of that evidence against him." (1 Ohio St. 2d, at p. 28.)

State v. Davis was decided December 29, 1964. The defendant did not commit this crime until May 29, 1965, and his preliminary hearing took place on June 2, 1965, six months after *Davis*.

When the defendant made motions at preliminary hearing to suppress certain evidence, the Municipal Court expressed its opinion that the motions on the merits were not well taken and should be overruled and that also the motions were premature, that the suppression of evidence was a problem for the Common Pleas judge. The defendant was then pointedly informed that he had chosen the incorrect forum to present such motions and could not in that Court preserve or waive any right to object to the State's evidence. Therefore, the defendant was directed to present his objections to the Court of Common Pleas. The defendant wilfully chose to ignore the import of this direction.

Proceedings prior to arraignment are not critical steps in the Ohio judicial process. *Bussey v. Maxwell, Warden*, 177 Ohio St. 111, 29 Ohio Op. 2d 271, 202 N.E. 2d 698 (1964), (action in habeas corpus wherein petitioner unsuccessfully urged that the state's failure to appoint counsel to act in his behalf until after he had pleaded not guilty to the indictment denied petitioner due process of law); *McLean v. Maxwell, Warden*, 2 Ohio St. 2d 226, 31 Ohio Op. 2d 454, 208 N.E. 2d 138 (1965) (action in habeas corpus wherein petitioner unsuccessfully urged that the denial of counsel until after his arraignment was a violation of his rights, citing *Escobedo v. Illinois*, 378 U.S. 478 (1964)). The ra-

tionale of these decisions is that, in Ohio, the preliminary hearing is merely an inquest to determine whether there is probable cause to bind an accused over to the grand jury for further investigation; no rights or defenses are lost in the preliminary examination. The defendant herein was positively identified as the assailant by key witnesses in the parking lot moments after the commission of the crime and this alone constituted probable cause to bind the accused over to the grand jury. As the defendant suffered no prejudice at this state of the legal process by the introduction of the evidence in question, which evidence was in fact found to be admissible and constitutionally proper and no rights were there and then waived or could be waived, it would appear that the Municipal Court properly refused to grant the defendant's motion. This would be consistent with the limited purpose of the preliminary hearing.

Having been adequately warned that the preliminary hearing was not the place at which a motion to suppress evidence would lie, defendant dallied until February 16, 1966, before once again coming forward. In the interim, defendant had been indicted, arraigned and *tried once without final effect. Furthermore, the second trial jury had been impaneled* and trial had thus reached that stage at which jeopardy attaches, for it is indisputable that, under Ohio law, trial commences with the impaneling of the jury. *State v. Davis* requires that an objection to evidence assertedly obtained by an unlawful search and seizure when such is known by defendant and his counsel must be made by a *pre-trial* motion to return the property or suppress the evidence. That the defendant waited far too long before reasserting his objection is clearly without doubt. His opportunity to present to the Court of Common Pleas his motion to suppress existed, at the very least, from July

23, 1965 (arraignment) until December 16, 1965 (date of first trial), a period of five months. The defendant then waited another two months to present his motion to suppress. His previous urging in a forum neither of record nor constitutionaly critical of the objection to evidence and his subsequent failure to make any objections or motions to suppress such evidence throughout the first trial wherein the State offered the evidence in question without further protest provides the classic justification for a State procedural rule designed to insure the orderly handling of criminal cases. All matters of fact relating to the admissibility of the evidence had been known by defendant and his attorney well in advance of the first trial. No reason of any kind was offered for the delay or the failure to comply with the rule. Neither the trial court nor the Court of Appeals would countenance trifling with this procedure by the defendant who belatedly sought to make worthless the efforts expended to the date of the second trial and he should not now be permitted to obtain such advantage after his conviction.

II.

WHEN A MOTION TO SUPPRESS EVIDENCE IS HELD TO BE UNREASONABLE AND WAIVER OF THE RIGHT TO FILE SAID MOTION HAS TAKEN PLACE UNDER THE AUTHORITY OF STATE V. DAVIS, 1 Ohio St. 2d 28 (1964), HENRY V. MISSISSIPPI, 379 U.S. 443 (1965) DOES NOT REQUIRE IN THIS CAUSE A RESULT CONTRARY TO THAT REACHED BY THE STATE COURTS BELOW.

The defendant's final argument concerns whether *State v. Davis*, 1 Ohio St. 28 (1964) must be reexamined in the light of the United States Supreme Court's decision in

Henry v. Mississippi, 379 U.S. 443 (1965). *Henry* states that where a non-federal procedural rule is applied to bar review of a federal claim, the rule must serve a legitimate state interest and the petitioner must have knowingly forgone his opportunity to assert his federal claim. *Henry* did not decide whether the procedural rule then before the court was unconstitutional but remanded the case to the state courts for a determination of the waiver question. The *Henry* decision was very close, the majority comprising only five Justices. Three positions were represented. Justice Brennan wrote the majority opinion (relying principally on *Fay v. Noia*, 372 U.S. 391 (1963); three Justices dissented to Justice Brennan's majority opinion in *Fay*) which ostensibly sought to ease the tension between the state and federal courts by "avoiding" the necessity for a decision on the adequacy of the state procedural ground. Justice Black dissented from the disposition of the case, feeling that the federal question should have been decided "here and now" (adversely to the state). On the other end of the spectrum from Justice Black stood Justices Harlan, Clark and Stewart (the three who had opposed the *Fay* result), who believed the judgment below rested upon an adequate independent state ground and naturally opposed the extension of *Fay*.

There is no doubt that the rule of *State v. Davis* serves the legitimate state purpose of avoiding delay and waste of time in the disposition of a case, and as applied by the court below, that purpose was effectuated. The rule is designed to eliminate precisely that kind of dilatory trial practice which had occurred in this case, and which, if now condoned, *would* result in intolerable waste and would impede the orderly administration of justice at trial. As Chief Justice Taft stated (1 Ohio St. 28, 31):

"The reason usually advanced for this rule is that the trial court should not be required to stop during the course of a trial to determine a collateral issue as to legality of the means by which the prosecution obtained its evidence. (citing 50 A.L.R. 2d 531, 585).

"Another reason for the rule is that the failure of a defendant to object to such illegally acquired evidence as soon as he can may reasonably lead the prosecutor to believe that defendant has no objection to such illegally acquired evidence. As a result, the prosecutor may reasonably rely upon such evidence as sufficient to establish a defendant's guilt instead of going to considerable trouble and expense to have available at the trial other evidence which could be offered against a defendant but which would be wholly unnecessary if the defendant was not going to object to the illegally acquired evidence.

"In our opinion, protection of a defendant does not require giving him such a procedural advantage over the state. Cf. *State v. Glaros* (1960), 170 Ohio St. 471, 166 N.E. (2d), 379, where a defendant was not permitted to rely upon an error which counsel for the defendant could have called but did not call to the court's attention at a time when such error might have been avoided and corrected."

Here, the defendant sat by while the State built its case around such evidence in one trial and was about to proceed on the same footing in a second trial. A jury had been selected and sworn. Yet, defendant comes forward now and contends that there would have been little inconvenience if this motion had been granted. To have denied the motion, asserts the defendant, was to exalt meaningless forms over substance. Counsel for defendant offers no explanation for the cavalier disregard of carefully reasoned and well-justified trial practice in the state of Ohio, a trial procedure of which defendant was aware as evidenced by the motions made in Municipal Court and the Court's response thereto.

The State must surmise that the failure to present these motions anew in the proper court at the proper time was a deliberate and knowing act binding upon defendant. As in *Davis*, "we do not have a situation where the accused or his counsel did not have knowledge of everything about the claimed illegal seizure of (evidence) in ample time to file a pretrial motion for their suppression as evidence." (1 Ohio St. 28, 32.) Moreover, nothing in *Davis* suggests that *this* defendant could be the victim of simple inadvertance, and no such facts as these are presented in this case to justify any claim that this case possesses great public interest or substantial constitutional infirmity. This case simply represents an instance where the defendant has reconsidered a tactical decision to forego pressing his rights and embarks upon a new course of action, all the while serenely confident that rules of procedure are one-sided in their application. In essence, the defendant does not allege that the rule of *Davis* is unclear as to the time beyond which no objection can be voiced, but rather, confesses surprise that the courts stand by the rule.

The respondent respectfully directs attention to Justice Brennan's language in *Henry*, which expresses his concern that "the record suggests a possibility that petitioner's counsel deliberately bypassed the opportunity to make timely objection in the state court, and thus that the petitioner should be deemed to have forfeited his state court remedies." (379 U.S., at p. 450.) By unseasonably filing its motion to suppress, the defense may have hoped to invite error and lay the foundation for a subsequent reversal. In this respect, respondent urges attention to the fact that defendant's present counsel did not present to this Court any mention of defendant's first trial and, thus, it is pre-

sumed that present counsel is completely aware of the significance of the delay in filing defendant's motion.

CONCLUSION

For the foregoing reasons the State of Ohio respectfully urges that the Writ requested in defendant's petition be denied.

Respectfully submitted,

C. HOWARD JOHNSON,
Attorney for Respondent.

AFFIDAVIT

STATE OF OHIO
FRANKLIN COUNTY, SS:

C. Howard Johnson, being first duly sworn, deposes and says that he is the duly elected and acting Prosecuting Attorney for Franklin County, Ohio and that three copies of the foregoing Brief In Opposition have been personally delivered to the attorneys for petitioner herein.

.....
C. HOWARD JOHNSON

Sworn to before me and subscribed in my presence this ..... day of December, 1967.

.....